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August 19, 1997

Via Federal Express

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

Re: Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming; Reply Comments of the Small Cable Business Association; CS Docket No. 97-141

Dear Mr. Caton:

We enclose for filing an original and 4 copies of the Reply Comments of the Small Cable Business Association in the above-referenced matter. Also enclosed is a copy to date-stamp and return in the enclosed pre-addressed Federal Express envelope.

Very truly yours,

Howard & Howard


Eric E. Breisach

EEB:cm

Enclosures

cc: Matthew Polka, Esq.
Meredith J. Jones, Chief, Cable Services Bureau
William Johnson, Deputy Bureau Chief
John Logan, Deputy Bureau Chief
Reed E. Hundt, Chairman
The Honorable James Quello, Commissioner
The Honorable Susan Ness, Commissioner
The Honorable Rachelle Chong, Commissioner
Claire Blue, Attorney Advisor

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

**Annual Assessment of the Status
of Competition in Markets for the
Delivery of Video Programming**

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CC Docket No. 97-141

To: The Commission

25/1997

**REPLY COMMENTS
OF THE
SMALL CABLE BUSINESS ASSOCIATION**

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August 19, 1997

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I. INTRODUCTION

In response to the Commission's Notice of Inquiry,¹ the Small Cable Business Association ("SCBA") provided Comments regarding competitive issues that especially impact upon small cable. A number of comments made by other parties, as well as recent significant activity by the United States Copyright Office, necessitate the filing of these reply comments.

II. UNREGULATED POLE ATTACHMENTS ADVERSELY IMPACT UPON SMALL CABLE

In its *Notice*, the Commission sought comment on the competitive impact of the exemption of municipal utilities, cooperatives and railroads from pole attachment rate regulation (the "Co-op Exemption").² SCBA and others reported pole rates offered by co-ops far exceeding national averages.³ SCBA highlighted the particularly harsh impact of excessive pole attachment rates upon small cable systems with low subscriber density and numerous pole attachments.⁴

¹ Notice of Inquiry, In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CS Docket No. 97-141 ("*Notice*").

² *Notice* at ¶ 20.

³ Comments of the Small Cable Business Association, CS Docket No. 97-141 ("*SCBA Comments*"), at pp 15-23. *See also*, Comments of the National Cable Television Association, CS Docket No. 97-141, pp 40-47 ("In rural areas in particular, access to utility poles at reasonable rates is a critical part of providing cable service and other new services for the many small cable operators that operate in such areas. . . . Over recent years, cable systems have reported rate increases—including increases ranging from a doubling to a quadrupling of rates—for coop pole attachments as well as substantial differentials between regulated and non-regulated pole rates."); Comments of U.S. West, Inc., CS Docket No. 97-141, pp 21-23 ("U.S. West has seen an increase in anti-competitive behavior in the pole attachment area from municipalities and electric cooperatives that seek to position themselves as telecommunications providers.").

⁴ *SCBA Comments* at 17.

By contrast, the co-op commenters predictably seek to maintain the status quo.⁵ The current statutory regime leaves co-op pole attachment rates to marketplace negotiations. Unfortunately for small cable, co-ops hold all the cards in so-called marketplace negotiations. Marketplace negotiations cannot function where one party has all the bargaining power. Two factors create this imbalance of bargaining power:

- **Economic Constraints.** Because small cable cannot afford to construct its own network of single-user poles for its aerial plant, it must access existing poles. Small cable principally serves rural, sparsely populated areas, often served by rural power cooperatives. Consequently, small cable must access rural cooperative poles more frequently in order to provide cable service to residents in rural America.
- **Legal Constraints.** Even if small cable could economically and practically construct its own pole network, local zoning and other restrictions would preclude, in virtually all cases, the construction of a duplicative pole network. Most franchises evidence this as they require cable operators to use existing poles.

Congress did not intend for cable operations to create multiple, duplicative pole networks. To the contrary, Congress created a statutory scheme requiring that cable, telecommunications and power providers share existing pole space under just and reasonable terms and conditions. The federal pole attachment rate formula creates a "zone of reasonableness" for pole attachment rates, bounded at the upper end by the pole owner's incremental costs of maintaining the pole. In this way, the statute protects cable operators from the excessive pole attachment rates that could otherwise be extracted by pole owners.

⁵ Comments of the National Rural Electric Cooperative Association, CS Docket No. 97-141 ("*NRECA Comments*"); Comments of the Minnesota Rural Electric Association, CS Docket No. 97-141; Comments of the Nebraska Rural Electric Association, CS Docket No. 97-141; Comments of UTC, CS Docket No. 97-141; Comments of Clay Electric Cooperative, Inc., CS Docket No. 97-141; Comments of the Florida Electric Cooperatives Association, Inc., CS Docket No. 97-141; Comments of the Jackson Electric Membership Corporation, CS Docket No. 97-141; Comments of the Montana Electric Cooperatives Association, CS Docket No. 97-141; Comments of the National Rural Telecommunications Cooperative, CS Docket No. 97-141, pp 23-24.

Unconstrained by regulation, co-ops have demonstrated that they will use their pole monopolies to extract excessive rates from small cable.

To demonstrate the abuse, SCBA surveyed its members and found that, while co-op rates varied dramatically, they far exceeded national averages.⁶ The National Rural Electric Cooperative Association (NRECA) survey supports SCBA's concerns.⁷ NRECA reports that its members, on average, charge pole rates of \$6.71 per pole,⁸ 42 percent higher than the national average of \$4.73 and 81 percent higher than the average state rate of \$3.71 derived by use of the FCC cap on just and reasonable rates.⁹ It is no wonder that co-ops oppose reasonable rate constraints.

Small cable bears the brunt of co-op pole attachment rate abuse. Because of its more rural subscriber base, small cable often must access pole networks owned by rural cooperatives. In turn, due to low subscriber density, small cable must string more plant to reach fewer subscribers than large urban-based operators. Consequently, small cable pays far more per subscriber in pole attachment fees than do large urban-based cable operators.

Small cable and small cable subscribers cannot continue to afford paying excessive rates to rural cooperatives. Failure to curb these abuses will severely restrict small cable's ability to remain price competitive with DBS providers and other multi-channel video program distributors. Because of its significant threat to competition, SCBA urges the

⁶ In SCBA's survey, members reported pole rates ranging from \$1.50 to \$13.40. On average, SCBA members reported rates of \$5.66 per pole, well in excess of the \$4.73 national pole attachment rate average.

⁷ *NRECA Comments* at p 2.

⁸ *Id.*

⁹ These averages are based on a 1995 pole rate survey. Michigan Public Service Commission Case No. U-10831, Exhibit I-55. The survey identified a \$4.73 national pole attachment rate average and a \$3.71 average for states computing pole attachment rates under the FCC methodology.

Commission and Congress to repeal the Co-op Exemption and subject rural cooperatives to the same "just and reasonable" rate constraints imposed upon other pole owners.

III. CONGRESS AND THE FCC MUST CREATE A UNIFIED SIGNAL CARRIAGE REGULATORY MODEL APPLICABLE TO CABLE, OVS AND DBS

After the date for submission of comments in this proceeding, the Copyright Office issued a report to Congress advocating significant legislative changes to implement new copyright policies involving the retransmission of broadcast signals.¹⁰ The *Copyright Report* addresses issues of critical importance to maintain a level competitive playing field with respect to multi-channel video programming providers.

A. Copyright Report Recommends DBS Retransmission of Local Signals

Under current law, DBS operators may retransmit network signals to their customers "unserved" by a network affiliate. The *Copyright Report* recognizes that this restriction "is a copyright substitute for a communications regulation (the network nonduplication rules) and, as such, is arguably better located in communications law."¹¹ Nonetheless, to resolve the unserved household controversy, the *Copyright Report* recommends that DBS operators be allowed to retransmit any broadcast station within the station's local market.¹² At the same time, the *Copyright Report* suggests legislative or Commission action to extend nonduplication restrictions to the satellite industry.¹³

¹⁰ *A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals*, U.S. Copyright Office, August 1, 1997 ("Copyright Report").

¹¹ *Copyright Report* at 117.

¹² *Copyright Report* at 118-119.

¹³ *Copyright Report* at 117.

B. The Link Between Copyright and Communications Policy

As recognized by the Copyright Office, copyright and telecommunications policy are inextricably intertwined. Once the *Copyright Report* recommended unfettered DBS right to retransmit local broadcast signals, it opened the door to a host of communications policy issues critical to cable operators. So long as DBS is allowed to retransmit local broadcast signals, Congress and the FCC must adopt a regulatory framework governing signal carriage issues comparable to other similarly situated providers of multi-channel video programming providers, including cable and OVS.

C. Must-Carry Should Extend to DBS

The *Copyright Report* advocates policy that will permit DBS retransmission of select local broadcast signals. Absent Congressional or Commission intervention, the Copyright policy will create a competitive imbalance between cable and DBS and will jeopardize the viability of many local broadcast stations.

Mandatory carriage of local broadcast signals represents the cornerstone of a unitary signal carriage policy. The only way to achieve regulatory parity between cable, OVS and DBS is to have the same must-carry requirement. This will require Congress to either expand the must-carry requirement to DBS, repeal it for cable and OVS, or rework the provisions and apply a new must-carry standard on all multi-channel video programming providers.

Congress has recently recognized that many broadcast stations could not survive without cable carriage.¹⁴ Earlier this year, the United States Supreme Court upheld the Congressional findings and declared the must-carry requirements consistent with a cable

¹⁴ 1992 Cable Act § 2(a)(16).

operator's First Amendment protections.¹⁵ As DBS continues its dramatic growth, its failure to carry any or all local broadcast signals will result in increasing harm to local broadcast stations.

The *Copyright Report* premises its recommendations on the eventual DBS technical ability to retransmit "local" network affiliates to subscribers in select local markets. Without limitations, DBS operators' ability to pick and choose the carriage of local broadcast signals will undoubtedly jeopardize local broadcast stations and local programming. Long ago, the Commission, and, more recently, Congress, determined that preserving the viability of local broadcast stations outweighed a cable operator's interest in selectively choosing the broadcast signals it would transmit over its system. DBS is no different. Allowing DBS operators to pick and choose local broadcast signals unhampered by the same localism obligations imposed on cable will hurt small local broadcast stations and the viewers in rural America who depend on them.

For each local broadcaster not carried on a DBS service, every DBS subscriber gain represents a lost local viewer and harm to local programming interests. More than 30 years ago, the Commission found the loss of local broadcast viewership by a cable subscriber unacceptable. Then, the Commission reasoned that the failure of a cable system to carry a local broadcast station "has in practical effect cut off the station from access to CATV subscribers," a result the Commission found to be "unreasonable," "destructive" and "contrary to the public interest."¹⁶ DBS poses the identical threat to local broadcasters.

¹⁵ *Turner Broadcasting System, Inc. v. F.C.C.*, 137 L Ed 2d 369, 409 (1997).

¹⁶ *Second Report and Order*, 2 F.C.C. 2d 725 (1966), at ¶ 26.

The must-carry statute compels cable operators to carry local broadcast signals. Moreover, the rules prevent cable operators from exacting fees from local broadcast stations that exert must-carry rights. These rules that protect the viability of local broadcast stations and help preserve local programming must extend to DBS. Principles of localism embodied throughout United States communications policy necessitate regulation parity between cable and DBS operators.

D. Other Carriage Restrictions Should Apply to DBS

With the right to retransmit broadcast signals comes the obligations to restrict carriage to avoid harm to local programmers. At the same time it advocates DBS retransmission of local broadcast signals, the *Copyright Report* suggests legislative or Commission action to extend certain carriage restrictions to the satellite industry. SCBA agrees that regulatory parity is essential. To achieve competitive parity between cable and DBS and protect local broadcasters from selective DBS carriage, DBS must satisfy the full panoply of signal carriage regulations applicable to cable, including provisions governing network non-duplication, syndicated exclusivity and the sports blackout rules.

IV. CONCLUSION

Small cable faces unique competitive challenges, many of which require modification of Commission regulations and statutory provisions. SCBA urges the Commission to request Congressional action to remove the pole attachment rate regulation exemption in light of the serious and widespread abuses SCBA members have experienced. SCBA also urges the Commission to create complete regulatory parity between cable and DBS. Regulatory parity

is imperative in light of the *Copyright Report* recommendation to allow DBS retransmission of local broadcast signals.

Respectfully submitted:

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August 19, 1997

CERTIFICATE OF SERVICE

I, Carol L. Malmud, a secretary at the law firm of Howard & Howard, do hereby certify that a copy of the foregoing "Comments of the Small Cable Business Association" was sent via first class mail, postage prepaid to the following persons, this 19th day of August, 1997.

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